IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN WILLIAM MCKELVEY, III,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12419

Trial Court No. 4FA-14-00040CR

APPEAL FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE BETHANY S. HARBISON, JUDGE

BRIEF OF APPELLEE

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Constitutional Provisions

United States Constitution, Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Alaska Constitution article I, section 14 provides:

> **Searches and Seizures**
>
> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Alaska Constitution article I, section 22 provides:

> **Right of Privacy**
>
> The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Statutes

49 United States Code 40102(a)(32) provides:

> (a) GENERAL DEFINITIONS.—In this part—
>
> . . .

(32) ''navigable airspace'' means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

49 United States Code 40103 provides:

Sovereignty and use of airspace

(a) SOVEREIGNTY AND PUBLIC RIGHT OF TRANSIT.—

(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architecturaland Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) USE OF AIRSPACE.—

(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

(3) To establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security, the Administrator, in consultation with the Secretary of Defense, shall—

(A) establish areas in the airspace the Administrator decides are necessary in the interest of national defense; and

(B) by regulation or order, restrict or prohibit flight of civil aircraft that the Administrator cannot identify, locate, and control with available facilities in those areas.

(4) Notwithstanding the military exception in section 553(a)(1) of title 5, subchapter II of chapter 5 of title 5 applies to a regulation prescribed under this subsection.

(c) FOREIGN AIRCRAFT.—A foreign aircraft, not part of the armed forces of a foreign country, may be navigated in the United States as provided in section 41703 of this title.

(d) AIRCRAFT OF ARMED FORCES OF FOREIGN COUNTRIES.—Aircraft of the armed forces of a foreign country may be navigated in the United States only when authorized by the Secretary of State.

(e) NO EXCLUSIVE RIGHTS AT CERTAIN FACILITIES.—A person does not have an exclusive right to use an air navigation facility on which Government money has been expended. However, providing services at an airport by only one fixed-based operator is not an exclusive right if—

(1) it is unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide the services; and

(2) allowing more than one fixed-based operator to provide the services requires a reduction in space leased under an agreement existing on September 3, 1982, between the operator and the airport.

Alaska Statute 11.61.195 (2012) provides:

> **Misconduct involving weapons in the second degree.**
>
> (a) A person commits the crime of misconduct involving weapons in the second degree if the person knowingly
>
> (1) possesses a firearm during the commission of an offense under AS 11.71.010 - 11.71.040;
>
> (2) violates AS 11.61.200 (a)(1) and is within the grounds of or on a parking lot immediately adjacent to
>
> (A) a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer; or
>
> (B) an entity, other than a private residence, licensed as a child care facility under AS 47.32 or recognized by the federal government for the care of children; or
>
> (3) discharges a firearm at or in the direction of
>
> (A) a building with reckless disregard for a risk of physical injury to a person; or
>
> (B) a dwelling.
>
> (b) Misconduct involving weapons in the second degree is a class B felony.

Alaska Statute 11.71.020 (2012) provides:

> **Misconduct involving a controlled substance in the second degree.**
>
> (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the second degree if the person
>
> (1) manufactures or delivers any amount of a schedule IA controlled substance or possesses any amount of a schedule IA controlled substance with intent to manufacture or deliver;

(2) manufactures any material, compound, mixture, or preparation that contains

(A) methamphetamine, or its salts, isomers, or salts of isomers; or

(B) an immediate precursor of methamphetamine, or its salts, isomers, or salts of isomers;

(3) possesses an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of methamphetamine, with the intent to manufacture any material, compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers;

(4) possesses a listed chemical with intent to manufacture any material, compound, mixture, or preparation that contains

(A) methamphetamine, or its salts, isomers, or salts of isomers; or

(B) an immediate precursor of methamphetamine, or its salts, isomers, or salts of isomer;

(5) possesses methamphetamine in an organic solution with intent to extract from it methamphetamine or its salts, isomers, or salts of isomers; or

(6) under circumstances not proscribed under AS 11.71.010 (a)(2), delivers

(A) an immediate precursor of methamphetamine, or the salts, isomers, or salts of isomers of the immediate precursor of methamphetamine, to another person with reckless disregard that the precursor will be used to manufacture any material, compound, mixture, or preparation that contains methamphetamine, or its salts, isomers, or salts of isomers; or

(B) a listed chemical to another person with reckless disregard that the listed chemical will be used to manufacture any material, compound, mixture, or preparation that contains

(i) methamphetamine, or its salts, isomers, or salts of isomers;

(ii) an immediate precursor of methamphetamine, or its salts, isomers, or salts of isomers; or

(iii) methamphetamine or its salts, isomers, or salts of isomers in an organic solution.

(b) In a prosecution under (a) of this section, possession of more than six grams of the listed chemicals ephedrine, pseudoephedrine, phenylpropanolamine, or the salts, isomers, or salts of isomers of those chemicals is prima facie evidence that the person intended to use the listed chemicals to manufacture, to aid or abet another person to manufacture, or to deliver to another person who intends to manufacture methamphetamine, its immediate precursors, or the salts, isomers, or salts of isomers of methamphetamine or its immediate precursors. The prima facie evidence described in this subsection does not apply to a person who possesses

(1) the listed chemicals ephedrine, pseudoephedrine, phenylpropanolamine, or the salts, isomers, or salts of isomers of those chemicals

(A) and the listed chemical was dispensed to the person under a valid prescription; or

(B) in the ordinary course of a legitimate business, or an employee of a legitimate business, as a

(i) retailer or as a wholesaler;

(ii) wholesale drug distributor licensed by the Board of Pharmacy;

(iii) manufacturer of drug products licensed by the Board of Pharmacy;

(iv) pharmacist licensed by the Board of Pharmacy; or

(v) health care professional licensed by the state; or

(2) less than 24 grams of ephedrine, pseudoephedrine, phenylpropanolamine, or the salts, isomers, or salts of isomers of those chemicals, kept in a locked storage area on the premises of a legitimate business or nonprofit organization operating a camp, lodge, school, day care center, treatment center, or other organized group activity, and the location or nature of the activity, or the age of the participants, makes it impractical for the participants in the activity to obtain medicinal products.

(c) In this section, "listed chemical" means a chemical described under AS 11.71.200 .

(d) Misconduct involving a controlled substance in the second degree is a class A felony.

Alaska Statute 11.71.030 (2012) provides:

Misconduct involving a controlled substance in the third degree.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the third degree if the person

(1) under circumstances not proscribed under AS 11.71.020 (a)(2) - (6), manufactures or delivers any amount of a schedule IIA or IIIA controlled substance or possesses any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver;

(2) delivers any amount of a schedule IVA, VA, or VIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or

(3) possesses any amount of a schedule IA or IIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus.

(b) It is an affirmative defense to a prosecution under (a)(3)(A) of this section that the prohibited conduct took place entirely within a private residence located within 500 feet of the school grounds or recreation or youth center, and that the prohibited conduct did not involve distributing, dispensing, or possessing with the intent to distribute or dispense a controlled substance for profit. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(c) Misconduct involving a controlled substance in the third degree is a class B felony.

Alaska Statute 11.71.040 (2012) provides:

Misconduct involving a controlled substance in the fourth degree.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

(1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;

(2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;

(3) possesses

(A) any amount of a

(i) schedule IA controlled substance; or

(ii) IIA controlled substance except a controlled substance listed in AS 11.71.150 (e)(11) - (15);

(B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;

(C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of

(i) three grams or more containing a schedule IIIA or IVA controlled substance except a controlled substance in a form listed in (ii) of this subparagraph;

(ii) 12 grams or more containing a schedule IIIA controlled substance listed in AS 11.71.160 (f)(7) - (16) that has been sprayed on or otherwise applied to tobacco, an herb, or another organic material; or

(iii) 500 milligrams or more of a schedule IIA controlled substance listed in AS 11.71.150 (e)(11) - (15);

(D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;

(E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;

(F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled substance; or

(G) 25 or more plants of the genus cannabis;

(4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance

(A) with reckless disregard that the possession occurs

(i) on or within 500 feet of school grounds; or

(ii) at or within 500 feet of a recreation or youth center; or

(B) on a school bus;

(5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;

(6) makes, delivers, or possesses a punch, die, plate, stone, or other thing that prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;

(7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;

(8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;

(9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; or

(10) affixes a false or forged label to a package or other container containing any controlled substance.

(b) It is an affirmative defense to a prosecution under (a)(4)(A) of this section that the prohibited conduct took place entirely within a private residence located within 500 feet of the school grounds or recreation or youth center. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(c) Nothing in (a)(5) or (6) of this section precludes a prosecution or civil proceeding brought under any other provision of this section or any other section of this chapter or under AS 17.

(d) Misconduct involving a controlled substance in the fourth degree is a class C felony.

Regulations

14 Code of Federal Regulations 91.119 provides:

Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of

1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) *Helicopters, powered parachutes, and weight-shift-control aircraft.* If the operation is conducted without hazard to persons or property on the surface—

(1) A helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section, provided each person operating the helicopter complies with any routes or altitudes specifically prescribed for helicopters by the FAA; and

(2) A powered parachute or weight-shift-control aircraft may be operated at less than the minimums prescribed in paragraph (c) of this section

14 Code of Federal Regulations 107.51 provides:

Operating limitations for small unmanned aircraft.

A remote pilot in command and the person manipulating the flight controls of the small unmanned aircraft system must comply with all of the following operating limitations when operating a small unmanned aircraft system:

(a) The groundspeed of the small unmanned aircraft may not exceed 87 knots (100 miles per hour).

(b) The altitude of the small unmanned aircraft cannot be higher than 400 feet above ground level, unless the small unmanned aircraft:

(1) Is flown within a 400-foot radius of a structure; and

(2) Does not fly higher than 400 feet above the structure's immediate uppermost limit.

(c) The minimum flight visibility, as observed from the location of the control station must be no less than 3 statute miles. For purposes of this section, flight visibility means the average slant distance from the control station at which prominent unlighted objects may be seen and identified by day and prominent lighted objects may be seen and identified by night.

(d) The minimum distance of the small unmanned aircraft from clouds must be no less than:

(1) 500 feet below the cloud; and

(2) 2,000 feet horizontally from the cloud.

STATEMENT OF ISSUES PRESENTED

After receiving an informant's tip that McKelvey was growing marijuana plants on his property in plastic five-gallon buckets that he would move into a greenhouse at night, Trooper Moore flew over the property and took photos. They show a visqueen-covered greenhouse and inside it what appear to be white plastic five-gallon buckets. Execution of the ensuing search warrant revealed a marijuana grow, methamphetamine, a loaded AK-47, and over $18,000 in cash, which in turn led to drugs and weapons charges. McKelvey unsuccessfully challenged the constitutionality of the overflight and was then convicted in a stipulated-facts trial. This appeal presents the questions:

(1) Did Trooper Moore's use of a zoom-lens camera to take aerial photos of McKelvey's property, including a greenhouse within the curtilage of his house, constitute a "search" under the Fourth Amendment?

(2) Should this court conclude that aerial observations constitute a "search" within the meaning of Alaska Constitution article I, section 14, even when they are unaided by any technological devices? And if the court concludes that the answer to that question is no, did Trooper Moore's use of a zoom-lens camera to take photos of McKelvey's property, including a greenhouse within the curtilage of his house, constitute a "search" within the meaning of Alaska Constitution article I, section 14?

STATEMENT OF THE CASE

Statement of facts

The relevant facts are not disputed and mostly come from Trooper Moore's affidavit in support of his search warrant application, testimony from evidentiary hearings on the motion to suppress, the trial court's order denying McKelvey's motion to suppress, and the stipulated facts presented to the court for trial.

On the early afternoon of August 22, 2012, Trooper Joshua Moore received a phone call from a confidential informant who said that he had been on William McKelvey's property on Grange Hall Road in Two Rivers, Alaska (an area approximately 13 to 25 miles outside of Fairbanks, on Chena Hot Springs Road).[1] [R. 89] The informant said that he had observed a marijuana grow operation on the property and that when he was there, the plants were in plastic five-gallon buckets and were sitting in the sun, but that McKelvey had greenhouses on the property and would move the plants inside at night. [R. 89] The informant estimated that he had seen at least 30 marijuana plants. [R. 89] The informant also said that while he was on the property, he overheard a conversation where McKelvey attempted to buy a gun. [R. 89]

Trooper Moore was familiar with McKelvey and was aware that in a 2009 case, troopers had found that McKelvey had a marijuana grow operation with 76 plants on the same property, along with numerous firearms. [R. 89] Trooper Moore also knew that McKelvey was a convicted felon (and thus barred from possessing firearms). [R. 89]

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[1] *See* https://en.wikipedia.org/wiki/Two_Rivers,_Alaska (last visited September 30, 2017).

Two days later, on August 24, 2012, Trooper Moore asked Trooper Justin Rodgers, a fish and wildlife officer and pilot for the Alaska State Troopers, to fly him out to McKelvey's property to see if he could corroborate the information provided by the informant. [R. 89; Tr. 34, 41] They left the Fairbanks airport at 2:50 p.m. and returned about an hour later, at 3:55 p.m., having flown out to the Two Rivers/Chena Hot Springs area and flown over McKelvey's property and another suspected grow operation nearby. [Tr. 42, 48] They flew there in a Piper Super Cub, which normally cruises at about 95 miles per hour, but slowed down to approximately 65 to 70 miles per hour while flying near McKelvey's property so that Trooper Moore could take pictures through an open window. [Tr. 36, 53-54, 85, 88, 105-06] Trooper Rodgers testified that he flew between 600 and 1000 feet above the terrain during this time (and the trial court later found that he flew at at least 600 feet). [R. 335; Tr. 39] Trooper Moore took photos using a Canon EOS 7D camera with a Canon EF 75-300 mm. zoom lens set to 280 mm. [R. 477, 504, 521-22] Trooper Moore saw a translucent greenhouse with what appeared to be plants potted in buckets inside. [R. 89; Evidentiary Hearing Exhibits C-F (overflight photos)]

Course of proceedings

Based on the information provided by the confidential informant and his own aerial observation of McKelvey's property, Trooper Moore obtained a search warrant for McKelvey's house and all other outbuildings and structures. [R. 82-90] Troopers executed the warrant on August 28, 2012, and upon doing so located and seized from McKelvey's shop a loaded AK-47 rifle that was hanging in the arctic entryway,

methamphetamine, scales used for weighing drugs and plastic bags used for their packaging, and over $18,000 in cash. [R. 296] This was in addition to the marijuana grow and other opiates that the troopers found. [R. 55, 85]

McKelvey was charged in a seven-count indictment in early January 2014, as follows:

- Count I – second-degree misconduct involving a controlled substance, AS 11.71.020(a)(1) (knowing possession of morphine with intent to manufacture or deliver);
- Count II – third-degree misconduct involving a controlled substance, AS 11.71.030(a)(1) (knowing possession of methamphetamine with intent to deliver);
- Count III – second-degree misconduct involving weapons, AS 11.61.195(a)(1) (knowing possession of a firearm during the commission of a drug offense);
- Count IV – fourth-degree misconduct involving a controlled substance, AS 11.71.040(a)(3)(G) (knowing possession of more than 25 marijuana plants);
- Count V – fourth-degree misconduct involving a controlled substance, AS 11.71.040(a)(2) (knowingly manufacturing, delivering, or possessing with intent to manufacture or deliver, mixtures or compounds of an aggregate weight of one ounce or more containing marijuana);
- Count VI – fourth-degree misconduct involving a controlled substance, AS 11.71.040(a)(3)(F) (knowingly possessing one or more mixtures or compounds of an aggregate weight of four ounces or more containing marijuana); and
- Count VII – fourth-degree misconduct involving a controlled substance, AS 11.71.040(a)(5) (knowingly keeping a shop, warehouse, or dwelling used for keeping or distributing controlled substances).

[R. 286-89]

McKelvey first moved to suppress the search warrant on the basis that the confidential informant's observations were stale and that the informant's personal knowledge and veracity had not been established. [R. 63-81] The court denied this motion on July 17, 2014. [Tr. 20-27]

McKelvey then filed a second motion to suppress, arguing that Trooper Moore's actions of flying over his property and taking photographs constituted an illegal search in violation of both the Fourth Amendment to the United States Constitution and Alaska Constitution article I, sections 14 and 22. [R. 499-523] His legal claims, as to both the United States and Alaska constitutions, had two parts – he claimed that aerial observation in general violated reasonable expectations of privacy because planes rarely flew over his property, and alternatively argued that the combined effect of (a) the trooper's use of a zoom-lens camera to take photos of (b) items within the curtilage of his house (which included the greenhouse at issue here) elevated the trooper's actions into a search. [R. 310-13, 323-27, 454-65, 499-523; Tr. 290-97, 309-13]

After several evidentiary hearings at which Trooper Moore, Trooper Rodgers, and McKelvey testified, the trial court denied the second motion to suppress. [R. 334-51] The court concluded that although McKelvey may have subjectively had an expectation of privacy, as manifested in the numerous "No Trespassing" and "Keep Out" signs posted around the perimeter of his property, he did not have an expectation of privacy from aerial observation of his greenhouse that society was prepared to accept as objectively reasonable. [R. 336-46] The court rejected McKelvey's assertion that overflight of his property was rare or non-existent, crediting testimony that there were flights in the area

and noting the general nature and volume of private aircraft flights in Alaska. [R. 343-44, 349-50] The court also rejected McKelvey's claim that the combination of Trooper Moore's use of a zoom lens set to 280 millimeters with the fact that he took photos of objects within the curtilage of McKelvey's house transformed his actions into a "search" for constitutional purposes. [R. 342-50] Accordingly, the court rejected McKelvey's claims made under both the Fourth Amendment and Alaska Constitution, article I, sections 14 and 22. [R. 350-51]

McKelvey then reached an agreement with the state, whereby the state agreed to dismiss five counts and McKelvey agreed to a stipulated-facts trial on the remaining counts. [R. 275] After considering the stipulated facts the court found McKelvey guilty of counts II and III (possession of methamphetamine with intent to deliver and possession of a firearm during commission of a drug offense) and the other counts were dismissed. [R. 275; Tr. 316-18, 322, 333]

McKelvey appeals.

ARGUMENT

I. USE OF A WIDELY AVAILABLE CAMERA WITH A STANDARD ZOOM LENS TO TAKE AERIAL PHOTOS OF MCKELVEY'S PROPERTY DID NOT TRANSFORM THE OVERFLIGHT INTO A SEARCH FOR PURPOSES OF THE FOURTH AMENDMENT

A. Standard of review

This case focuses on the second prong of the reasonable-expectation-of-privacy test, *i.e.*, "'is that expectation one that society is prepared to recognize as [objectively] reasonable?'" *Cowles v. State*, 23 P.3d 1168, 1170 (Alaska 2001) (cited and quoted case omitted). In general this is a question of law reviewed independently. *See, e.g.*, *Beltz v. State*, 221 P.3d 328, 332 (Alaska 2009). But as seen in the text below, this second prong can involve factual issues where the defendant bears the burden of proof and the court's findings are reviewed under the "clearly erroneous" standard.

B. The Fourth Amendment permits warrantless police overflights that are conducted in accord with FAA regulations, in areas where overflight is not unexpected, and that are conducted in a manner that does not violate reasonable expectations of privacy

McKelvey implicitly concedes that in light of the Supreme Court's decisions in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), and *Florida v. Riley*, 488 U.S. 445, 109 S.Ct. 693 (1989), the police overflight of his property, conducted in accord with Federal Aviation Administration ("FAA") minimum height and airspace-use regulations, was as a general matter not a "search" under the Fourth Amendment to the United States Constitution (and hence did not require a warrant). [At.Br. at 9-12] But McKelvey argues that what converted Trooper Moore's actions into a search under the

Fourth Amendment was his use of a camera with a 75-300 millimeter zoom lens to take photos that included objects within the curtilage of his house.[2] [At.Br. at 12-13]

As seen below, McKelvey's specific Fourth Amendment claim is without merit. But because McKelvey also appears to ask this court to adopt the position of the *Ciraolo* dissenters as a matter of state law under Alaska Constitution article I, sections 14 and 22, *i.e.,* to hold that aerial observations in general (even without technological aids such as binoculars or zoom-lens cameras) constitute "searches" that require a warrant, it is appropriate to examine federal case law on aerial observation. This will provide a basis for understanding the state's subsequent arguments in Section II of this brief. As seen in Section II, the state disagrees with McKelvey's claim that aerial observations should be deemed a "search" under the Alaska Constitution, but agrees with him that the United States Supreme Court's case law on aerial observation has some analytical flaws and should be modified in a fashion consistent with the values underlying Alaska's search-and-seizure provision. But as will be further developed in Section II of this brief, Trooper Moore's actions were nonetheless proper under the Alaska Constitution.

The three Supreme Court cases discussing the propriety of aerial observation under the Fourth Amendment have all analyzed the matter under the familiar two-part test set out in Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516 (1967), which requires a defendant to establish that (1) he had a subjective expectation of privacy in the area invaded by a government actor, and (2) that

[2] Although he argued otherwise in the trial court, McKelvey does not on appeal challenge the trial court's finding that he had not shown that overflight of his property was rare or non-existent.

expectation is one that society is prepared to accept as objectively reasonable.[3] Prior to adoption of the *Katz* test, the Court's "Fourth Amendment jurisprudence was tied to common-law trespass." *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 2042 (2001). The Court modified its Fourth Amendment jurisprudence to adopt the *Katz* test because technological advancements made it possible for official surveillance to be accomplished "without any physical penetration of or proximity to the area under inspection," so that "physical trespass no longer function[ed] as a reliable proxy for intrusion on privacy." *Dow Chemical Co. v. United States*, 476 U.S. 227, 247-48, 106 S.Ct. 1819, 1832 (1986) (Powell, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.). But the Court later clarified in *United States v. Jones*, 565 U.S. 400, 404-11, 132 S.Ct. 945, 949-53 (2012), that the *Katz* test merely supplanted – *i.e.*, was in addition to, but did not abolish – traditional trespass-based law for what constitutes a search. As will be discussed later, this is significant because trespass can play a role in evaluating the legality of helicopter and drone flights.

The fact that *Katz* did not eliminate the original trespass-based approach to defining what constitutes a "search" for Fourth Amendment purposes is also significant because the Court has never completely gotten away from trespass concepts in applying the *Katz* test, in the aerial observation context and elsewhere. The Court has always focused on whether the observer was in a place that he had a right to be. *See, e.g.*, *California v. Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1813; *Florida v. Jardines*, 569 U.S. 1,

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[3] *See California v. Ciraolo*, 476 U.S. 207, 211-15, 106 S.Ct. 1809, 1811-14 (1986); *Dow Chemical Co. v. United States*, 476 U.S. 227, 234-39, 106 S.Ct. 1819, 1825-27 (1986); *Florida v. Riley*, 488 U.S. 445, 448-52, 109 S.Ct. 693, 695-97 (1989).

7-9, 133 S.Ct. 1409, 1415-16 (2013). In this regard it is helpful to understand basics about where aircraft have a right to be.

At common law, the right to use airspace was controlled by the owner of the land; the Latin maxim *cujus est solum, ejus est usque ad coelom et ad inferos* applied, meaning, "[t]o whomsoever the soil belongs, he owns also to the sky and to the depths." *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985, 991 (Ohio 1996). But the Supreme Court recognized in *United States v. Causby*, 328 U.S. 256, 261, 66 S.Ct. 1062, 1065 (1946), that "that doctrine has no place in the modern world. The air is a public highway, as Congress has declared." The relevant modern statutory provision, 49 U.S.C. § 40103, provides in subsection (a)(2) that "A citizen of the United States has a public right of transit through the navigable airspace." In turn, 49 U.S.C. § 40102(a)(32) defines "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part[.]"[4] 14 C.F.R. § 91.119(b) requires airplanes to maintain an altitude of at least 1,000 feet in congested areas and 500 feet in non-congested areas. But there are no fixed minimum height requirements for helicopters, *see* 14 C.F.R. § 91.119(d), so in particular with regard to helicopters, compliance with FAA regulations cannot be the determining factor in whether the overflight violates objectively reasonable expectations of privacy.

[4] Although this statute defines "navigable airspace" solely in terms of minimum altitude regulations, other statutes and regulations further limit where aircraft can fly, closing off some areas entirely to overflight (*e.g.*, some military bases and other sensitive sites), closing off other areas to general private aviation while permitting commercial aviation, or limiting overflight to a defined corridor, *etc.* It is beyond the scope of this brief to explicate all these provisions, but it suffices to note that height restrictions are not the only restrictions on where light private and general aviation aircraft may fly.

Turning to the first prong of the *Katz* test, whether the person exhibited a subjective expectation of privacy in the area at issue, it remains the case that actions taken to shield a location's privacy from horizontal observation on the ground, *i.e.*, the erection of walls, fences, or gates, or placement of "No Trespassing" or "Keep Out" signs, do not provide any protection against aerial observation. *See Florida v. Riley*, 488 U.S. at 449, 109 S.Ct. at 696-97. And as Justice O'Connor noted in her concurrence,

> even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the "precautions customarily taken by those seeking privacy."

Id. at 454, 109 S.Ct. at 699 (cited and quoted case omitted). But the erection and placement of walls, fences, gates, and signage is in some sense a measure of the fact that one is trying to protect one's privacy. Otherwise, as courts have noted, the only way to create privacy on property would be to conduct all actions indoors or underneath a covering. So it is reasonable to generally treat actions taken in order to ensure privacy against ground observation as proxies for an expectation of privacy against aerial observation, while recognizing that, depending on the facts, it is possible that a person may lack a subjective expectation of privacy in actions taken or items located entirely outdoors, or under a transparent covering. Courts have tended to assume a subjective expectation of privacy from aerial observation based on erection of walls, fences, gates, or signage and simply moved on to examine the second prong of the *Katz* test. In this case it appears appropriate to assume (as the trial court did) that McKelvey had a

subjective expectation of privacy based on his extensive efforts to keep unwanted persons off his property. [R. 340-43]

Turning to the second prong of the *Katz* test, whether the defendant's expectation of privacy is one that society is prepared to recognize as objectively reasonable, as a practical matter it remains the case that it is impossible to block observation from the air of any activities conducted or items placed outside in the open. But the objective reasonableness of an expectation of privacy is not controlled merely by the physical laws that govern the act of observing, but rather is governed by societal expectations and laws governing what we are permitted to try to observe in the first place. The Supreme Court has thus focused first on the question of whether the aircraft was in public airspace, *i.e.*, was in compliance with the FAA's minimum altitude regulations and other provisions governing where aircraft may operate. *See California v. Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1813; *Florida v. Riley*, 488 U.S. at 451-52, 109 S.Ct. at 697.

However, as both the plurality and Justice O'Connor's concurrence recognized in *Florida v. Riley*, it is not merely the fact that the aircraft is in a location where it has a legal right to be that acts to defeat any reasonable expectation of privacy from aerial observation. A second factor must be assessed – the frequency or likelihood of overflights is also relevant.[5] While there is overflight in most areas of the United States,

[5] *See id.* at 450-51, 109 S.Ct. at 697 (noting that private and commercial overflight is routine in America and stating that "there is no indication that such flights are unheard of in Pasco County, Florida"), and *id.* at 453, 109 S.Ct. at 698 (O'Connor, J., concurring) (noting that the prevalence of overflight is more significant than compliance with FAA height regulations in evaluating expectations of privacy against overflight). Justice O'Connor also noted that the defendant bears the burden of establishing that a

there are exceptions; there are areas where overflight is prohibited (*e.g.*, military bases and other sensitive sites), there are places in unusually remote locations where there is no overflight, and there are places where only commercial aviation is permitted.

The preceding two factors do not end the *Katz* expectation-of-privacy analysis as to aerial observation. While the Court has in effect concluded that there is in general no reasonable expectation of privacy against observation from aircraft operating in the public airspace and put the burden on defendants to show that overflights of their property are uncommon, the third factor of the analysis is whether the overflight was conducted in an intrusive manner that violated reasonable expectations of privacy. The

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"search" occurred, *i.e.*, the burden of establishing both prongs of the *Katz* expectation of privacy test. *Id.* at 455, 109 S.Ct. at 699. Because this is so, and because public use of navigable airspace is common in America, she noted (like the majority) that it was incumbent on Riley to show that overflight of his property was not common. *Id.* This is consistent with Alaska law. This court has recognized that it is first incumbent on the defendant to show that a search occurred, *i.e.*, that a reasonable expectation of privacy was violated. *See Stamper v. State*, 402 P.3d 427, 430 & n.5 (Alaska App. 2017). Once the defendant establishes that a search occurred, only then does the burden shift to the state to justify its legality. McKelvey had the burden of showing an objectively reasonable expectation of privacy and, given the prevalence of overflight in the United States and Alaska in particular, it is appropriate to put the burden on the defendant to establish that overflight of his property was so rare that he had a reasonable expectation that his property would not be observed from the air.

In this case, it was undisputed that there was a private airstrip one mile from McKelvey's property. [Tr. 40, 79, 231-32] McKelvey nonetheless claimed that overflights of his property were rare to non-existent. [Tr. 232] The court rejected this claim. [R. 343-44, 349-50] The court's finding was not clearly erroneous. McKelvey conceded that there was air traffic to and from the nearby airstrip, Trooper Moore testified that he had been involved in law enforcement training at that airstrip, and he testified that he had flown in the Chena Hot Springs area on several occasions. [Tr. 76-77, 97, 102, 232] The court could credit this testimony and view it in light of the nature of general aviation in Alaska, and conclude that overflight was reasonably common in the area and that McKelvey had not shown otherwise.

burden is on the defendant to show that it was. *See California v. Ciraolo*, 476 U.S. at 211-15, 106 S.Ct. at 1811-14; *Florida v. Riley*, 488 U.S. at 448-52, 109 S.Ct. at 695-97.

Last, the Court has recognized that in the overflight context, common-law distinctions between houses, curtilage, and open fields are not controlling and that observation of the defendant's curtilage from the air does not *per se* violate reasonable expectations of privacy. *California v. Ciraolo*, 476 U.S. at 213, 106 S.Ct. at 1812-13.

C. Trooper Moore's use of a zoom-lens camera to take photos that included the curtilage of McKelvey's house did not convert the aerial observations in this case to a search that required a warrant because the photos did not convey the degree of detail and perspective of an observer actually on the property

McKelvey does not appear to dispute that the overflight of his property, had it been conducted without any photography, would not have constituted a search for Fourth Amendment purposes (*i.e.*, he does not press forward with his fact-bound claim, rejected by Judge Harbison, that overflights of his property were rare). But he argues that what makes this case different from an ordinary overflight is that Trooper Moore used a camera with a 75-300 millimeter zoom lens set to 280 millimeters to take photos of the greenhouse within the curtilage of his house. [At.Br. at 12-13] But McKelvey is wrong in concluding that the Court has not since *Dow Chemical* formulated a standard that encompasses technological monitoring of the home and surrounding areas. It has, in *Kyllo v. United States*, 533 U.S. 27, 34, 121 S.Ct. 2038, 2043 (2001), and the test is whether the technology provides the level of information that a person's unaided senses would pick up if the person was actually in the area at issue. The photos here were not

that detailed and the fact that they included a greenhouse within the curtilage of McKelvey's house did not transform the overflight into a search.

Under the trespass-based test that long governed the issue of whether something constituted a search under the Fourth Amendment, if law enforcement officers were trespassing, that was sufficient to render their actions a search (provided that the trespass was "conjoined with. . . an attempt to find something or obtain information," *United States v. Jones*, 565 U.S. 400, 408 n.5, 132 S.Ct. 945, 951 n.5 (2012)), and it was unnecessary to consider whether the officer used any technological enhancement of the human senses. And under that same trespass-based standard, if the officer was not physically trespassing, visual observation of the location from afar was not a search. "Visual surveillance was unquestionably lawful because 'the eye cannot by the laws of England be guilty of a trespass.'" *Kyllo*, 533 U.S. at 31-32, 121 S.Ct. at 2042 (cited and quoted cases omitted). The issue of whether technological enhancement of the senses transforms law enforcement action into a Fourth Amendment search only comes into play under the *Katz* reasonable-expectation-of-privacy test.

Applying the reasonable-expectation-of-privacy test, the Court stated in *Kyllo* that "we have previously reserved judgment as to how much technological enhancement of ordinary [human] perception from such a vantage point [where one can observe a home and its curtilage], if any, is too much[,]" *i.e.*, would constitute a search. 533 U.S. at 33, 121 S.Ct. at 2043. The Court noted that "[w]hile we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found 'it important that this is *not* an area immediately adjacent to a private home, where privacy

expectations are most heightened." *Id.* (quoting *Dow Chemical*, 476 U.S. at 237 n.4, 106 S.Ct. at 1826 n.4). *Kyllo* did not involve vision-enhancing technology but rather infrared heat-sensing technology, but the general standard it established (whether the technology obtains information about the home or its curtilage that could not have been obtained without a physical trespass into those areas) for assessing the legality of technological devices used to gather information from the home applies to use of vision-enhancing technology. As seen below, the *Kyllo* standard is consistent with pre-existing case law that recognized that with respect to visual observation, a fair amount of magnification and distance-shortening optical devices may be used without turning such actions into a "search" under the Fourth Amendment.

The Court noted in *United States v. Knotts*, 460 U.S. 276, 282, 103 S.Ct. 1081, 1086 (1983), that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case," thus recognizing that some technological enhancement of senses will not render law enforcement actions a search. Significantly, the Court quoted *United States v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 748 (1927), which stated that use of a marine glass or a field glass would not be a search. *Knotts*, 460 U.S. at 283, 103 S.Ct. at 1086. The citation to *United States v. Lee* is significant because it recognizes what the Court recognized in *Kyllo*, *i.e.*, that the Fourth Amendment took into account those technologies that were in effect when it was enacted

in 1791, and that even then the science of optics was sufficiently well-developed such that it was possible to observe from a distance items or actions taking place outside.[6]

The Court in *dicta* in *California v. Ciraolo* discussed how much technological enhancement of the sense of vision would suffice to convert a law enforcement officer's action into a search. The Court noted that "[t]he State acknowledges that '[a]erial observation of curtilage may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens.'" *California v. Ciraolo*, 476 U.S. at 215 n.3, 106 S.Ct. at 1814 n.3 (quoting California's brief). The language was *dicta* because the case involved an unaided observation, and the language did not purport to set out an exclusive formulation, but it gives an idea of the relative degree of advantage or enhancement that must be conferred by a technological device in order for its use to transform a law enforcement officer's action into a Fourth Amendment search. Rendering perceptible an object that was imperceptible to the naked eye involves a significant degree of technological enhancement of the sense of vision.

The Supreme Court further expounded in *Kyllo* on the degree of technological enhancement necessary to transform a law enforcement officer's efforts to gather information about a home and its environs into a Fourth Amendment search. The Court

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[6] *Kyllo* adopted a test for when use of sense-enhancing technology will constitute a search – when the "technology in question is not in general public use" – in order to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted[,]" 533 U.S. at 34, 121 S.Ct. at 2043, thus implicitly recognizing that the Fourth Amendment took into account those technologies that existed when it was adopted.

stated: "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area, *Silverman*, 365 U.S., at 512, 81 S.Ct. 679, constitutes a search[.]" *Kyllo*, 533 U.S. at 34, 121 S.Ct. at 2043. And the Court noted that "[t]he dissent's proposed standard – whether the technology offers the 'functional equivalent of actual presence in the area being searched,' *post*, at 2050 – would seem quite similar to our own at first blush[,]" disagreeing with the dissent primarily as to the application of that standard. *Id.* at 39-40, 121 S.Ct. at 2046. With respect to the sense of vision, this means an enhancement that gives a view with the same level of detail that a person *on the property* would have; an enhancement that merely gives a better, closer-up view of the property is insufficient to constitute a search.

The Court has also set out one other criterion for evaluating when use of a technological enhancement of the senses will transform a law enforcement action into a Fourth Amendment search. In *Dow Chemical*, and later again in *Kyllo*, the Court concluded that the dividing line between when use of a sense-enhancing technology constitutes a "search" and when it does not is when the technology used is "not generally available to the public[.]" *Dow Chemical*, 476 U.S. at 238, 106 S.Ct. at 1827; *Kyllo*, 533 U.S. at 34, 121 S.Ct. at 2043 ("not in general public use").

Under these standards, Trooper Moore's use of a 35 mm. camera with a 75-300 mm. zoom lens was not a search. Taking the above-listed criteria in reverse order, both of these types of equipment are widely commercially available to the public, and McKelvey does not claim otherwise. McKelvey claims that the use of the 35 mm. camera combined

with the zoom lens setting of 280 mm. resulted in a nine-fold magnification, [At.Br. at 4-5, 12], but as seen in the attached appendix and in the photos taken of McKelvey's property, zoom lens settings of this magnitude do not materially enhance what the unaided eye can see to such a degree that they should be considered to constitute a search.[7] *See* Evidentiary Hearing Exhs. C-F (overflight photos). McKelvey claims that the greenhouse was imperceptible and that Trooper Moore's use of the zoom-lens camera rendered it perceptible, [At.Br. at 12], thus attempting to bring his case within the previously quoted language from *Ciraolo*, but the trial court correctly characterized this "as an assisted plain view observation." [R. 347] Trooper Moore's use of the camera and zoom lens allowed him to close the distance between his 600-foot-plus height and the ground and get pictures showing the view that the unaided eye would have at a closer distance than 600 feet, but the pictures do not convey the view that a person who was actually on McKelvey's property (or even fairly close to it) would have. Significantly, courts have held that the use of such zoom-lens magnification settings does not constitute a search.[8] Trooper Moore did not violate the Fourth Amendment by conducting a warrantless overflight and using a zoom-lens camera to take photos of the greenhouse on McKelvey's property that was in the curtilage of his house but visible from the air.

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[7] https://www.nikonusa.com/en/learn-and-explore/a/tips-and-techniques/understanding-focal-length.html# (last visited October 30, 2017)

[8] *See* 1 D.Rudstein, C.Erlinder, & S.Thomas, *Criminal Constitutional Law*, § 2.03[2][d], at 2-94 n.333 (Matthew Bender 2017) (collecting cases involving use of 70-230 mm. lens, 90-250 mm. lens, 200 mm. lens, 300 mm. lens, and 600 mm. lens).

The state does not assert that it is impossible for a combination of (a) sense-enhancing technology used to gather information from (b) the curtilage of a home to violate objectively reasonable expectations of privacy. Rather, the state simply recognizes that expectations of privacy can vary within the curtilage, that effects of sense-enhancing technology can vary as well, and that it is impossible (and not fruitful) to formulate a standard more precise than that in *Kyllo.* To take an example, couples do not ordinarily make love in the garden shed, but they could, and so the use of intrusive technology to peer into such sheds might in some circumstances invade reasonable expectations of privacy. But it has always been the case that even before airplanes, a neighbor on a hilltop or in a nearby building might be able to see from the heights an activity conducted in uncovered curtilage that could not be seen from ground level because of shrubs, trees, or fences. It is impossible to lay down an absolute or highly precise standard by which expectations of privacy can be evaluated in this context, and Fourth Amendment cases to some degree have always turned on their individual facts and resisted standards more precise than "reasonable suspicion" and "probable cause." This remains true when factoring sense-enhancing technology into the mix, and the *Kyllo* test provides a workable and useful standard for courts to protect expectations of privacy.

California aptly noted in *California v. Ciraolo* that:

> The privacy secured by the Fourth Amendment is categorically different than a mere hope that things exposed outside the home are unlikely to come to the government's attention. The concern of the authors of the Amendment was not to throw up invisible shields to the commonplace vision routinely experienced in a three-dimensional world, but to ensure protection against the unreasonable searches and seizures they had so recently suffered during which the security of their persons, their homes,

> papers and effects was, in every measure, violated. It is a highly dubious proposition that in seeking to secure the liberty denied the people who created this nation from the oppression wreaked by the general warrant and writs of assistance, what was uppermost on their minds was the sheriff's gimlet-eye from the stockade rampart or church belfry.

Pet.Reply.Br., *California v. Ciraolo*, 1985 WL 669871, at *40. To that observation might be added the thought that the use of middle-of-the-road zoom-lens technology to take photos of items located in the curtilage of a home but clearly visible from the heights, and which come nowhere near the detail and perspective that a person would have if they were in the curtilage, similarly does not implicate the core concerns of the Fourth Amendment. Trooper Moore's actions did not constitute a Fourth Amendment search.

II. AERIAL OBSERVATION DOES NOT CONSTITUTE A SEARCH WITHIN THE MEANING OF ALASKA CONSTITUTION ARTICLE I, SECTION 14, AND TROOPER MOORE'S USE OF A ZOOM-LENS CAMERA TO TAKE PHOTOS THAT INCLUDED THE CURTILAGE OF MCKELVEY'S HOUSE DID NOT CONSTITUTE A SEARCH UNDER ARTICLE I, SECTION 14

A. Standard of review

The standard of review set out in Section I.A of this brief as to McKelvey's federal claims also applies to his state law claims.

B. Discussion

McKelvey cites the court to the dissent in *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809 (1986), and to decisions from appellate courts in California, Hawaii, New Mexico, and Vermont, but the positions of these courts are not uniform and McKelvey does not clearly articulate what position he wishes this court to adopt regarding the general legality of warrantless aerial observation under Alaska Constitution article I, section 14.[9] [At.Br. at 13-19] He appears to argue that, at a minimum, purposeful naked-eye aerial observation that focuses on the home or its curtilage should be prohibited. [At.Br. at 13-19] But he also states that the case can be resolved on narrower grounds, arguing that the use of sense-enhancing technology such as the zoom-lens camera used here is a search under the Alaska Constitution when it is used to gather information about objects within the curtilage of a home. [At.Br. at 13-19] For the reasons set out below, this court should decline to adopt the position that McKelvey proposes.

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[9] McKelvey cites to *People v. Cook*, 710 P.2d 299 (Cal. 1985), *State v. Quiday*, 377 P.3d 65 (Hawaii App. 2016), *State v. Davis*, 321 P.3d 955, 961 (N.M. App. 2014), *aff'd on federal constitutional grounds*, 360 P.3d 1161 (N.M. 2015), and *State v. Bryant*, 950 A.2d 467 (Vt. 2008). [At.Br. at 17-19]

1. While Alaska's courts have the authority to do so, they should not adopt standards for aerial observations and use of sense-enhancing technology that are significantly different than the federal standards

Assessing McKelvey's claims requires the court to examine two things – what general legal basis does the court have for adopting different standards under the Alaska Constitution, and do McKelvey's specific arguments in favor of adopting different standards support his position? As seen below, the state agrees that the court has authority to adopt different standards under the Alaska Constitution, and it agrees that the court should adopt slightly different standards than those set out in federal law. However, McKelvey errs in claiming that warrantless purposeful aerial observation should be prohibited under the Alaska Constitution, and Trooper Moore's actions in this case were consonant with the standard that should govern under the Alaska Constitution.

Turning to the first issue, this court has often stated that an interpretation divergent from federal law should not be given unless something in the text, context, or history of the Alaska constitutional provision justifies it. *See, e.g., Shorty v. State*, 214 P.3d 374, 379 (Alaska App. 2009). But with respect to the search-and-seizure provisions of Alaska Constitution article I, section 14, Alaska's courts have long recognized that the later-added privacy clause in Alaska Constitution article I, section 22 supports a broader reading of Alaska Constitution article I, section 14. *See, e.g., Municipality of Anchorage v. Ray*, 854 P.2d 740, 750-51 (Alaska App. 1993) (citing cases). Accordingly, this court is not bound by the United States Supreme Court's Fourth Amendment case law on aerial observations in evaluating what standard it should adopt under the Alaska Constitution.

2. *This court should reject the reasons offered by the Ciraolo dissent and by the courts in those states that prohibit warrantless overflights*

Turning to the primary issue of what standard to adopt, the state will begin by discussing the main reasons why the court should reject McKelvey's proposal to follow the *Ciraolo* dissent and the decisions from the handful of states which have prohibited warrantless aerial observation under their own constitutions or have substantially limited the circumstances under which law enforcement can conduct aerial observation of private property. The state will not engage in a thorough-going explication of all the flaws in the reasoning of these cases, but rather will focus on the main reasons advanced in these cases in support of the courts' holdings, in order to illustrate why these cases do not fit with the values underlying Alaska's constitution and are inconsistent with Alaskans' long-standing relationship with private and commercial aviation.

a. The fact that aerial observation is purposeful rather than random is not controlling under Fourth Amendment law and prohibiting purposeful surveillance while allowing random surveillance is illogical

The *Ciraolo* dissent and courts in some states have found it significant that a law enforcement officer's explicit purpose was to seek out information about a particular property from the air; these courts have thus held that purposeful surveillance requires a warrant whereas inadvertent warrantless observations can be admitted in evidence against a defendant.[10] The Supreme Court majority rejected this claim in *Ciraolo,* stating:

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[10] *See California v. Ciraolo*, 476 U.S. at 223-25, 106 S.Ct. at 1818-19 (Powell, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.); *State v. Ainsworth*, 770 P.2d 58, 60-61 (Or. App. 1989), *rev'd on appeal State v. Ainsworth*, 801 P.2d 749 (Or. 1990); *State v. Quiday*, 377 P.3d 65, 71-72 (Hawaii App. 2016).

> [W]e find difficulty understanding exactly how respondent's expectations of privacy from aerial observation might differ when two planes pass overhead at identical altitudes, simply for different purposes. We are cited to no authority for this novel analysis or the conclusion it begat. The fact that a ground-level observation by police "focused" on a particular place is not different from a "focused" aerial observation under the Fourth Amendment.

476 U.S. at 214 n.2, 106 S.Ct. at 1813 n.2.[11] The desire to prohibit purposeful police action is in part based on the following flawed (at step two) chain of logic: (1) police are permitted to do what any citizen can do, but (2) conversely should be prohibited from doing anything that a citizen cannot do; citizens are not authorized to investigate crimes, and we don't expect it from them, so therefore (3) police officers should not be able to investigate. This argument "proves too much." Pet.Reply.Br. at *28 n.6, *California v. Ciraolo*, 1985 WL 669871. As California noted in its briefing in *Ciraolo*:

> To state the question as being whether the public is anticipated to undertake conduct identical in form, purpose, and effect to that of police virtually assures that police conduct will be a search. One might just as well say people do not normally expect their neighbors to track their packages with a beeper through the streets, tail them to their door, stake out their house, record the telephone numbers they dial, pose as criminals to monitor their statements inside the home, or, in general,

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[11] As a dissenting judge recognized in the *Ainsworth* case:

> Although certainly purposefulness is an element to be considered, it does not by itself create a search in the constitutional sense. If it did, a game warden could not travel remote county roads looking for illegal game activity; state police could not use radar equipment to ticket speeding motorists; and officers could not look for marijuana plants growing on unposted land.

Ainsworth, 770 P.2d at 62 (Rossman, J., dissenting). The Oregon Supreme Court agreed, noting that purposive police action does not transform a permissible observation into an unconstitutional search. *State v. Ainsworth*, 801 P.2d 749, 753 (Or. 1990).

> investigate. This should come as less than a surprise, however, since we pay the police to do those things (without a warrant).

Id. When a police officer's behavior is externally consistent with what a private citizen could do at the same location, the fact that the officer is acting with an investigative purpose is irrelevant. The Alaska Supreme Court so held in *Cowles v. State*, 23 P.3d 1168, 1172-73 (Alaska 2001), stating that "[i]f a person's activities are open to view by the public, however, the fact that they are actually observed for the purpose of detecting misconduct does not affect the results of a Fourth Amendment analysis." *Id.* at 1173. (The court was also referring to Cowles' state constitutional claims. *Id.* at 1170-75.)

Besides its novelty and lack of support in Fourth Amendment jurisprudence, another reason to reject the purposeful-conduct distinction is that it represents, at least on the part of some courts or judges, a conflating of the inadvertence requirement for plain-view observations (the situation where an officer is executing a search warrant and sees in plain view contraband that is not within the warrant's terms), with those situations "in which an observation is made by a police officer without a prior intrusion into a constitutionally protected area." 1 W.LaFave, *Search and Seizure*, § 2.2(a), at 559 (5th ed. 2012).[12] The latter is not subject to an inadvertence requirement, *McGee v. State*, 614 P.2d 800, 806-07 n.12 (Alaska 1980), and indeed as the Supreme Court noted in *Ciraolo*, most law enforcement conduct is purposeful, and the legality of individual police acts does not generally turn on whether they were purposeful.

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[12] *See, e.g., State v. Quiday*, 377 P.3d at 74 (Fujise, J., dissenting) (noting that Hawaii case law had confused the two doctrines in the context of overflights); *State v. Vogel*, 428 N.W.2d 272, 278 (S.D. 1988) (Sabers, J., dissenting) (conflating plain view and open view).

The purposeful-conduct distinction suffers from several other serious analytical flaws. As California's brief in *California v. Ciraolo* noted, it rests on the premise that "acting on suspicion to observe one yard from the air is bad while acting on none to observe all is good." Pet.Br. at *40 n.15, *California v. Ciraolo*, 1985 WL 669860. It is a situation where "exclusionary rule concerns lurk beneath a mask of privacy expectation analysis. The California court might just as well have said that all aerial observations of fenced residential yards are searches but only directed flyovers can be deterred by a warrant requirement." Pet.Br. at *42 n.16, *California v. Ciraolo*, 1985 WL 669860. But as California pointed out, application of the exclusionary rule to such a rule (that only purposeful flyovers are prohibited) would be extremely problematic; among other things, "police could avoid exclusion [of evidence] if they dissemble about the degree to which they focused on a specific fenced yard." *Id.* As California noted, "something has gone very wrong with the Fourth Amendment when the eminently reasonable police activity in this case is outlawed but, by only modest logical extension, legitimacy is conferred on 'random' enhanced viewing of a whole neighborhood of unfenced yards from a government satellite in geosynchronous orbit." *Id.*

The desire to prohibit "focused" aerial observation of curtilage is also flawed because there is no basis to think that there is a significant practical difference between random and focused observation. As California noted in its brief in *California v. Ciraolo*:

> In terms of visual privacy, it is difficult to discern where the difference lies other than the broad scope of the former. Regardless of how a particular aerial observation is characterized – random, routine, focused or something else – the police look at something specific. The discrimination of the viewer is always 'focused' at a particular place in

> the very act of looking. While Ciraolo stresses that the focus is undertaken by the "practiced eye" of the policeman (Resp.Br. 30), this is true of all criminal investigation. If focusing was relevant, visual discrimination in any kind of police observation of curtilage would suggest that what occurred was a search.

Pet.Reply.Br. at *16-17, *California v. Ciraolo*, 1985 WL 669871.

b. The fact that aerial observation takes in items within a home's curtilage is not significant because the Fourth Amendment only prohibits warrantless physical intrusion into curtilage, not visual observation of exposed items in the curtilage, and as a practical matter it is difficult to avoid observing the curtilage or to discern the curtilage's boundaries when observing adjacent areas

The *Ciraolo* dissent – and some of the cases that McKelvey urges this court to follow, such as *People v. Cook*, 710 P.2d 299, 303-08 (Cal. 1985) – are also unpersuasive because of their emphasis on the fact that the things observed were within the home's curtilage. As seen below, this is inconsistent with long-standing Fourth Amendment case law and the practical realities of aerial observation.

Beginning with the case law, the Supreme Court has long recognized that *visual observation* of objects within a home's curtilage is permissible and that it is only *physical intrusion* into the curtilage that is problematic. In the landmark case of *Hester v. United States*, 265 U.S. 57, 58, 44 S.Ct. 445, 446 (1924), revenue agents trespassed onto Hester's father's property, staking out a position in the "open fields" portion of the property (*i.e.,* that portion beyond the house and curtilage), where they watched Hester come out and hand over a liquor bottle near the door of the house and then fetch a gallon jug from a car near the house. The Supreme Court held that the agents' observations of these actions (which actions took place in the curtilage of the house) did not constitute a

search. *Id.* And in *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409 (1976), the Court held that police observation from across the street of a woman standing in the doorway of her house did not violate any reasonable expectation of privacy.

In *United States v. Knotts*, 460 U.S. 276, 278-79, 103 S.Ct. 1081, 1083-84 (1983), police located a container of chloroform outside the defendant's cabin by monitoring a beeper in the container from a helicopter after losing sight of a vehicle that was transporting the chloroform. While recognizing that Knotts had the "traditional expectation of privacy within a dwelling place" as to actions taking place and items inside the cabin, *id.* at 282, 103 S.Ct. at 1085, the Court found dispositive the fact that there was "no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin." *Id.* at 285, 103 S.Ct. at 1087. Because visual observation "from public places . . . adjoining Knott's premises" could have revealed the presence of the chloroform container on the property, the use of the beeper to determine its location was not a search. *Id.* at 282, 284, 103 S.Ct. at 1086-87. And in *United States v. Karo*, 468 U.S. 705, 104 S.Ct. 3296 (1984), the Court again affirmed the propriety of visual observation from outside the curtilage of items within the curtilage. The Court distinguished Karo's situation by noting that "[f]or purposes of the [Fourth] Amendment, the result is the same where, without a warrant, the Government employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." 468 U.S. at 715, 104 S.Ct. at 3303.

Relying on the above case law, the *Ciraolo* majority rejected the claim that visual observation, from outside the curtilage, of activities, persons, or objects inside the curtilage of a home constituted a Fourth Amendment search. *California v. Ciraolo*, 476 U.S. at 213-14, 106 S.Ct. at 1812-13. As the Court later summarized *Ciraolo* in *Florida v. Riley*, 488 U.S. at 449, 109 S.Ct. at 696, "Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion." The Court later reiterated in *Kyllo*, 553 U.S. at 32, 121 S.Ct. at 2042, that "the lawfulness of warrantless *visual* surveillance of a home has still been preserved," and framed the dispositive question in *Florida v. Jardines*, 569 U.S. at 7, 133 S.Ct. at 1415, as whether the officer's investigation of a home "was accomplished through an unlicensed *physical* intrusion." (Italics added). So the weight of Fourth Amendment case law was against the proposition that visual observation of a home's curtilage from outside the curtilage constitutes a search, as the *Ciraolo* majority correctly recognized.

Practical concerns also support the view that the line between curtilage and open fields should not demarcate what law enforcement officers are permitted to observe from the air. For one thing, "[i]n most cases it would be impracticable to view one without contemporaneously viewing the other." *United States v. Bassford*, 601 F.Supp. 1324, 1332 (D.Me. 1985). Additionally, if the officer has not had a chance to observe the property from the ground prior to the overflight, it may prove difficult to evaluate from the air where the boundaries of the home's curtilage are (or to evaluate whether a structure is in fact a home or is something else). This is why the majority correctly recognized in *Ciraolo*, 476 U.S. at 213-15, 106 S.Ct. at 1812-14, that as a practical matter

everything that is out in the open and not covered by a roof or other covering can be seen from the air. Thus, given the prevalence of overflight in the United States, the fact that a person or object is located inside the uncovered curtilage of a home should not in general give rise to a reasonable expectation that the person or object will not be seen from the air. Other state courts have agreed.[13]

c. The chances that the uncovered curtilage of an Alaska residence will be seen by the occupants of low-flying small aircraft are very realistic, and hence there is no reasonable expectation of privacy against aerial observation of those items left exposed or activities conducted outdoors

The *Ciraolo* dissent is also unpersuasive because it relies heavily on what the average passenger in a commercial jetliner flying at high altitudes could see and fails to take into account the reality of general aviation flights in small planes. The dissent states: "The only possible basis for [the majority] holding is a judgment that the risk to privacy posed by the remote possibility that a private airplane passenger will notice outdoor activities is equivalent to the risk of official aerial surveillance." *California v. Ciraolo*, 476 U.S. at 224, 106 S.Ct. at 1818 (Powell, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.). The dissenters claim that "[t]ravelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over

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[13] *See, e.g., Henderson v. People*, 879 P.2d 383, 388-91 (Colo. 1994) ("in general, a curtilage is not protected from observations that are lawfully made from outside its perimeter not involving physical intrusion"); *Commonwealth v. Oglialoro*, 579 A.2d 1288, 1292 (Pa. 1990) ("As long as the police have the right to be where they are, and the activity is clear and visible, the fact that they are peering into curtilage is of no significance"); *State v. Vogel*, 428 N.W.2d 272, 274-75 (S.D. 1988).

which they pass." *Id.* at 223, 106 S.Ct. at 1818. The dissent asserts that "[a]s all of us know from personal experience, at least in passenger aircrafts, there rarely – if ever – is an opportunity for a practical observation and photographing of unlawful activity similar to that obtained by Officer Shutz in this case." *Id.* at 224 n.8, 106 S.Ct. at 1818 n.8. McKelvey cites Professor LaFave's treatise, which finds this aspect of the *Ciraolo* dissent persuasive. [At.Br. at 16 & n.2 (citing 1 W.LaFave, *Search and Seizure*, § 2.3(g), at 799-800 (5th ed. 2012))]

With respect, the *Ciraolo* dissent's observation may have some force as to persons traveling at 600 m.p.h. in commercial jets at 33,000 feet, but it fails to take into account the reality of small-aircraft flights, particularly in Alaska. FAA regulations require such aircraft to maintain an altitude of 1,000 feet over congested areas and 500 feet over non-congested areas. 14 C.F.R. § 91.119(b)-(c). Alaskans are very familiar with seeing small planes flying overhead in the 500-1000 feet range. McKelvey claims that while there may be a lot of small planes overhead in Alaska, the occupants of these planes are generally seeking to view open public lands, *i.e.*, that it is uncommon for small planes in Alaska to fly over and have a good overview of homes and objects within their curtilage. [At.Br. at 15] He is in error. Virtually every village in this state has an airstrip, and villagers are used to mail planes, air taxis, and game guides flying over their houses, gardens, and sheds. This is also true in urban areas. If one lives in Turnagain or Spenard underneath the flight path to Lake Hood in Anchorage, one sees small planes flying

directly overhead multiple times per day, all summer.[14] Ditto for those who live in East Anchorage under the flight path to Merrill Field. As the trial court in this case aptly observed:

> Alaska is a state where public use of small aircraft is very common, and it also is a state where photography and visual magnification from the air is very commonplace. In Alaska, wildlife viewing, hunting, and photography are all common pursuits, both by Alaska residents and by the many tourists who visit Alaska each year. Because of the nature of Alaska's geography and relative scarcity of roads and other modes for ground-travel, it is unsurprising that the best views of Alaska's wilderness and wildlife are often afforded via aircraft. Hunters often search for the presence of game with binoculars via aircraft in advance of a hunt, and Alaskan wildlife and nature photographers often take photos from airplanes flying over the subject of their photography. To say that the public uses a combination of low-flying aircraft and visual magnification on a regular basis in Alaska is certainly no exaggeration, considering that much of Alaska's tourism industry is built around this very practice.

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d. Law enforcement overflights are infrequent and the prospect of having one's actions seen by officers from the air has not driven Alaskans to conduct all their activities indoors

Last, the *Ciraolo* dissent relies on somewhat hyperbolic assertions about the frequency with which law enforcement officers will engage in warrantless aerial surveillance and the supposed resulting effect of causing people to conduct all of their activities inside lest they risk exposing them to aerial surveillance. *California v. Ciraolo*,

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[14] Lake Hood is the world's busiest seaplane base, having almost 600 takeoffs and landings on peak summer days. *See* FAA *Alaskan Region Aviation Fact Sheet* (January 2016), available at https://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/air_traffic_services/artcc/anchorage/media/Alaska_Aviation_Fact_Sheet.pdf (last visited October 11, 2017).

476 U.S. at 224-25 & n.10, 106 S.Ct. at 1818-19 & n.10 (Powell, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.). But *Ciraolo* is a 31-year-old decision, and police overflights are apparently sufficiently rare in Alaska such that Alaska's appellate courts have not yet addressed their constitutionality under the Alaska Constitution. Trooper Moore testified that he only conducted 2-3 overflights of marijuana grow operations per summer. [Tr. 97-98]

e. This court should decline to adopt out-of-state case law that proposes vague, multi-factor tests for assessing the legality of law-enforcement overflights

Some of the out-of-state authorities that McKelvey relies on adopted tests for evaluating the constitutionality of aerial overflights that, if not out-right banning them, have proved to be either vague or extremely difficult to apply, the latter consisting of multi-part tests with no real criteria for what weight to assign the differing factors. *See, e.g.*, *State v. Quiday*, 377 P.3d 65, 71 (Hawaii App. 2016); *State v. Bryant*, 950 A.2d 467, 477-79 (Vt. 2008). But the Alaska Supreme Court has recognized that "the law of search and seizure should be written with a view to those whose conduct it is meant to control[,]" *i.e.*, police officers, and that "[s]ubtle distinctions, which even lawyers find hard of application, should be avoided." *Ferguson v. State*, 488 P.2d 1032, 1035 (Alaska 1971). Courts and individual judges have recognized that these vague or multi-factor tests for evaluating the constitutionality of aerial observations provide little to no prospective guidance to police officers and violate the principle recognized in *Ferguson*. *See, e.g.*, *State v. Ainsworth*, 801 P.2d 749, 754 (Or. 1990); *State v. Bryant*, 950 A.2d at 482-83,

488 (Dooley, J., dissenting). This mitigates in favor of adopting a standard similar to the federal standard, which provides relatively clear guidance as to the conditions under which warrantless aerial observations are permitted.

f. This court should follow the majority of jurisdictions which permit warrantless law enforcement overflights

Last, the state notes that McKelvey's invocation of authority from other jurisdictions is selective and ignores the greater number of states that have followed the Supreme Court's decisions in *California v. Ciraolo* and *Florida v. Riley* and that generally permit warrantless overflights where the aircraft is compliant with FAA altitude and airspace regulations and is operating in a normal manner.[15]

Ultimately, evaluating whether an expectation of privacy is objectively reasonable involves "a value judgment . . . whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional constraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." *Cowles v. State*, 23 P.3d 1168, 1171 (Alaska 2001) (cited and quoted sources omitted). "The utility of the challenged police conduct must be considered in making this judgment." *Id.* "Whether an

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[15] *See, e.g., Blalock v. State*, 483 N.E.2d 439, 442-43 (Ind. 1985); *Commonwealth v. One 1985 Ford Thunderbird Auto*, 624 N.E.2d 547, 549-51 (Mass. 1993); *State v. Ainsworth*, 801 P.2d 749, 750-54 (Or. 1990); *State v. Vogel*, 428 N.W.2d 272, 274-77 (S.D. 1988); *State v. Roode*, 643 S.W.2d 651, 652-53 (Tenn. 1982); *State v. Myrick*, 688 P.2d 151, 153-55 (Wash. 1984). *See also State v. Davis*, 360 P.3d 1161, 1167-72 (N.M. 2015) (warrantless aerial surveillance is generally permissible, but actions in this case violated FAA regulations and were unduly intrusive); *State v. Little*, 918 N.E.2d 230, 234-38 (Ohio App. 2009) (same); *Commonwealth v. Oglialoro*, 579 A.2d 1288, 1290-94 (Pa. 1990) (same).

expectation of privacy is justified 'must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.'" *Id.* (cited and quoted sources omitted). Given that Alaska relies on both private and commercial aviation more than any other state in the Union, so that Alaskans are used to small planes overhead, and given the rarity of police overflights and their utility as an investigative tool, Alaska more appropriately aligns with the majority of jurisdictions that permit warrantless aerial observation.

3. This court should generally apply the same factors the federal courts do in assessing police aerial observation, but should place slightly greater emphasis on the question of whether the overflight was conducted in a manner that violates reasonable expectations of privacy

For the reasons set out above, this court should decline McKelvey's invitation to follow the position of the *Ciraolo* dissent and those jurisdictions that prohibit all aerial observation without a warrant or that prohibit purposeful aerial observation (of all things or just the curtilage). But as the state has previously noted, the court has the ability to adopt a standard under the Alaska Constitution that is slightly different than the federal standard and that is responsive to the flaws in the federal standard. The state thus sets out below the standard that should govern under the Alaska Constitution.

Beginning with the general standard for aerial observations (*i.e.*, those observations made with the naked eye and not facilitated by sense-enhancing technology), *Ciraolo* and *Florida v. Riley* appropriately begin by looking at whether the aircraft is in a place that it legally has a right to be, *i.e.*, is in compliance with FAA

statutes and regulations regarding minimum flight altitude and airspace usage. It is also appropriate to look at whether aircraft overflight is prevalent in the area at issue (though in Alaska aircraft overflight is so prevalent in general that this factor can be assumed, placing the burden on the defendant to demonstrate that overflight is not prevalent in the area at issue). But these factors are not exclusive measures of the propriety of a particular overflight; courts should also examine the intrusiveness of the overflight and whether it was conducted in a manner that did not violate reasonable expectations of privacy *Florida v. Riley*, 488 U.S. at 451-52, 109 S.Ct. at 697.

Courts have nonetheless come close to treating the first two factors as the *de facto* standard for assessing the legality of an overflight. This would be a mistake because the first two factors are insufficient in guarding privacy, particularly in the case of aircraft such as helicopters and drones, which are not subject to the same minimum altitude restrictions that airplanes are. *See* 14 C.F.R. § 91.119(d) (helicopters); 14 C.F.R. § 107.51(b) (drones). Given the heightened emphasis on privacy manifested in Alaska's constitution, Alaska's courts should carefully examine the manner of overflights to ensure that they are not unduly intrusive and do not violate objectively reasonable expectations of privacy. Straight-line overflight at 800 feet may be okay; repeated circling, low-elevation hovering, or other maneuvering to peer in residential windows may not be okay.

4. *The court should adopt the same main standard used by the Supreme Court to evaluate whether the use of sense-enhancing technology constitutes a search – whether it provides the same level of information and detail that the human sense being augmented would be able to pick up if a person was physically at the location from which the information is being gathered – but decline to adopt commercial availability as a test because it is not a reliable proxy for invasiveness of privacy*

The court should also adopt a slightly different standard than that set out in federal law for assessing when the use of a particular technological enhancement will transform an observation into a "search" within the meaning of Alaska Constitution article I, section 14. The state will discuss why below, but first will discuss the role that the privacy clause in Alaska Constitution, article I, section 22 should play in this analysis.

McKelvey states that Alaska Constitution article I, section 22 was passed by the voters as a "pre-emptive check on the looming threat advances in technology pose to Alaskans' sense of privacy." [At.Br. at 14] Threats posed by technology may be one of its concerns, but the language and sparse history of the provision do not give any clear guidance as to when the use of sense-enhancing technology will provide such an advantage over the unaided senses so as to transform a law enforcement information-gathering action into a "search" for purposes of Alaska Constitution, article I, section 14.

A vocal minority of delegates to Alaska's original Constitutional Convention in 1955 were very concerned with wiretapping. *See* V.Fischer, *Alaska's Constitutional Convention* (University of Alaska Press, Fairbanks 1975), at 69-70. They did not carry the day, but less than 20 years later, a privacy clause was added to Alaska's constitution, and it has been noted that although this was not its exclusive focus, at least one main concern behind it was the threat to privacy posed by criminal justice agency databases.

See 1986 Alaska Inf. Atty. Gen. Op. 441, 1986 WL 81228, at *1 & n.2. So it seems correct to say that the privacy clause is concerned with incursions on privacy that are made possible by technology. It is also apparent that there was a desire to explicitly codify the right to privacy to give it greater protection. But nothing in the language or sparse history of Alaska Constitution article I, section 22 provides clear guidance on the issue presented here, and the state believes that existing United States Supreme Court precedent (with modifications) is sufficient to resolve the issue of when use of sense-enhancing technology will constitute a search.

Beginning with those aspects of Supreme Court precedent that should be modified or not imported into Alaska's case law, the Court has placed strong emphasis on whether the technology at issue is commonly available to the public. *Dow Chemical*, 476 U.S. at 238, 106 S.Ct. at 1827; *Kyllo*, 533 U.S. at 34, 121 S.Ct. at 2043 ("not in general public use"). This rests in large part on the idea that commercial availability functions as a proxy for invasiveness of privacy, the theory being that the average person does not have access to highly sophisticated, privacy-invading technology. This assumption might have made sense years ago, but today it is dubious at best. And as the dissent in *Kyllo* explained, "this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available." *Kyllo*, 533 U.S. at 47, 121 S.Ct. at 2050 (Stevens, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ.). This court should reject commercial availability as a factor in analyzing whether use of a particular technology transforms an action into a "search" for constitutional purposes.

As discussed in Section I of this brief, the antiquity of some technologies may militate in favor of their use not being considered something that transforms an action into a "search" for constitutional purposes. This is so in part because the Fourth Amendment (and by extension its Alaska analogue) can be viewed as having taken into account the technologies that existed when it was adopted. It is also true because when a technology has been around for a long time, people can factor it into their conduct in structuring expectations of privacy, and may also be able to devise methods that defeat or mitigate the privacy-invading aspects of the technology. The primary sense-enhancing technologies of long-standing origin are binoculars and telescopes. The state is not asserting that such technologies may not be used in ways that constitute clear invasions of privacy – they can, such as using a telescope from a location where the observer has no right to be to peer into a house through small gaps in closed curtains. Rather, the state is simply asserting that some technologies are of sufficient age and venerability that their use does not, in and of itself, act as a decisive factor in transforming a police information-gathering exercise into a "search" for constitutional purposes, requiring a warrant.

The primary criteria for when use of sense-enhancing technology will elevate a police officer's information-gathering act into a search for constitutional purposes should focus on the intrusiveness to privacy and relative sense-enhancement advantage conferred by the technology. As noted in Section I of this brief, the best formulation for making this evaluation was agreed upon by both the majority and the dissent in *Kyllo*. The majority stated, "We think that obtaining by sense-enhancing technology any information . . . that could not otherwise have been obtained without physical 'intrusion into a constitutionally

protected area,' (citation omitted), constitutes a search[.]" *Kyllo*, 533 U.S. at 34, 121 S.Ct. at 2043. Justice Stevens' dissent framed the inquiry as whether the technology "provides its user with the functional equivalent of actual presence in the area being searched." *Id.* at 47, 121 S.Ct. at 2050 (Stevens, J., dissenting, joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ.).

Applying this test, the use of vision-enhancing technology should only be deemed a "search" when it gives a picture that is significantly more detailed than what the human eye would be able to see if the human was at the distance advantage gained by the technological enhancement – to use Justice Stevens' words, a picture so detailed it is as if the observer were actually physically on the property. Examining the photos taken by Trooper Moore shows that the view is still that of McKelvey's property at a distance, and is not so detailed as to convey the view that Trooper Moore would have had if he were actually on the property. [Evidentiary Hearing Exh. C] His use of the zoom lens set to 280 mm. did not constitute a search.[16]

Last, McKelvey, echoing the *Ciraolo* dissent's reference to the "use [of] an airplane – a product of modern technology," 476 U.S. at 222, 106 S.Ct. at 1817 – also asserts that it is the combination of an "on-demand aircraft" and sense-enhancing

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[16] The state also notes that it is the actual use of the equipment that counts, not the equipment's maximum capabilities. *See Dow Chemical*, 476 U.S. at 238 n.5, 106 S.Ct. at 1827 n.5 ("Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations. '[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.'") (cited case omitted). So even if the zoom lens had the capability of achieving much greater magnification, that is irrelevant, the focus being on its actual use.

technology that makes the difference. [At.Br. at 13] But the aircraft itself adds nothing to the sense of vision – it does not make a naked-eye observation any clearer, nor does it increase the power of a zoom lens. It is a technology that allows humans to go where they could not go before, but it does not enhance any of the five senses. And while it is true that most Alaskans do not own an aircraft, the average person can charter a small plane in Alaska.[17] The fact that some agencies such as the Alaska State Troopers own small aircraft does not give them a radically significant advantage over ordinary Alaskans in terms of ability to observe locations from the air. The majority in *Ciraolo* was correct to implicitly reject this as a factor, and this court should too.

5. *Trespass law retains vitality as a means of addressing low-level helicopter and drone flights directly over property, and other helicopter and drone flights can be evaluated under the general expectation-of-privacy standards used to evaluate police overflights*

This case involved the use of light aircraft, a Piper Super Cub, and not a helicopter or drone, but because this court is being asked to formulate general standards for aerial observations, it is appropriate for the state to briefly note how the analysis laid out above would apply to those types of aerial vehicles.

First, the state notes that use of trespass-based standards for determining when something constitutes a "search" retains vitality as a means of combatting invasions of

[17] Many average Alaskans – schoolteachers, small business owners, *etc.* – do own airplanes. There are 7,933 pilots in Alaska and 9,346 registered aircraft. FAA *Alaskan Region Aviation Fact Sheet* (January 2016) (full internet cite set out at p.33 n.13).

privacy by low-flying drones and helicopters.[18] Although Congress's adoption of legislation turning the skies into public airspace limited the applicability in America of the ancient legal fiction that a landowner owned not only the land but the sky above it, all the way to the heavens, courts have continued to recognize that landowners have a valid claim for trespass for those incursions into the airspace that they may legally make use of. *See, e.g., Bevers v. Gaylord Broadcasting Co., L.P.*, 2002 WL 1582286, at *6 (Tex. App. 2002) (unpublished); *Geller v. Brownstone Condominium Ass'n*, 402 N.E.2d 807, 809 (Ill. App. 1980).[19] Trespass-based standards for determining what constitutes a search (and hence requires a warrant) can serve as a vehicle to address the situation of the drone or helicopter hovering above one's property in one's usable airspace, peering into private activities that could not be observed from the ground.[20]

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[18] Alaska Statute 18.65.902 provides in relevant part that "A law enforcement agency may use an unmanned aircraft system (1) to gather evidence in a criminal investigation (A) under the express terms of a search warrant issued by a court; or (B) in accordance with a judicially recognized exception to the warrant requirement[.]" If a flight is conducted in a manner such that it is not a "search" for purposes of the federal and Alaska constitutions, then paragraph (B) would appear to be satisfied.

[19] *Bevers* cites Section 159(2) of the Restatement (Second) of Torts, which provides that "Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land." 2002 WL 1582286, at *6.

[20] Although the Alaska Supreme Court long ago said that Alaska had adopted the two-part reasonable-expectation-of-privacy test from Justice Harlan's concurrence in *Katz* as the standard for whether law enforcement action constitutes a "search" under the Alaska Constitution, *see State v. Glass*, 583 P.2d 872, 875 (Alaska 1978), for Fourth Amendment purposes this court is bound by the United States Supreme Court's decision in *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945 (2012), which recognized that *Katz* merely added to the trespass-based test and did not eliminate it. Moreover, it is apparent

Second, when the drone or helicopter is not trespassing in the airspace of a property, the reasonable-expectation-of-privacy test should be used to evaluate whether their use constituted a search. The use of drones in particular may present some novel situations, but courts can analogize to existing expectations of privacy to evaluate such questions. If it would violate privacy to put a ladder up against a house and peer in through a second-story window, it should likewise violate privacy to obtain the same view by means of a drone. By carefully applying the reasonable-expectation-of-privacy test in light of Alaska's strong protection of privacy, courts can ensure that drones and helicopters are used in non-intrusive manners.

6. The court could alternatively deem overflights to be a "search" of areas where there is a diminished expectation of privacy, and not require a warrant or allow overflights based on reasonable suspicion

Last, the state notes two potential alternatives that Alaska's courts may choose to adopt. The supreme court stated in *State v. Myers*, 601 P.2d 239, 242 (Alaska 1979), that "[w]hen a police intrusion takes place in a context in which only a 'diminished expectation of privacy' exists, such a search must be 'reasonable' within the meaning of the Constitution, but may not necessarily be subject to the warrant requirement." The supreme court followed this in *Beltz v. State*, 221 P.3d 328, 335-39 (Alaska 2009), where it upheld warrantless searches of garbage, requiring only that the law enforcement officer

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from the Alaska appellate courts' frequent references to whether the observer was in a place that he had a right to be when he made the observation, that Alaska's courts likewise never completely eliminated the relevance of trespass-based standards for evaluating whether an action constitutes a "search" under the Alaska Constitution. *See, e.g., Pistro v. State*, 590 P.2d 884, 887 (Alaska 1979). A trespass-based test for whether an action is a search under the Alaska Constitution is still valid.

have reasonable suspicion of wrongdoing before engaging in such a search. There is clearly a diminished expectation of privacy that one's outdoor activities conducted in uncovered areas will not be observed from the air. The court could conclude that overflights do not require any quantum of suspicion or a warrant, and only scrutinize the manner in which they are conducted; or it could allow warrantless overflights based on reasonable suspicion, and scrutinize the manner in which the overflight is conducted. The state does not advocate for or against either of these approaches, but notes that they are preferable to requiring a warrant for all law-enforcement-initiated overflights.

CONCLUSION

This court should affirm the superior court's decision concluding that Trooper Moore's overflight and aerial photography of McKelvey's property did not constitute a search within the meaning of either the Fourth Amendment or Alaska Constitution article I, section 14.

DATED this 30th day of October 2017, at Anchorage, Alaska.

JAHNA LINDEMUTH
ATTORNEY GENERAL

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